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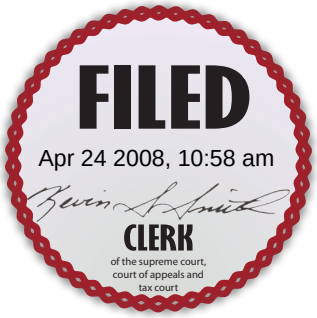

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IN THE
COURT OF APPEALS OF INDIANA

BRYAN WOODARD,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 22A01-0709-CV-446
	)	
CITY OF NEW ALBANY,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE FLOYD CIRCUIT COURT
The Honorable J. Terrence Cody, Judge
Cause No. 22C01-0110-CP-518

April 24, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff Bryan Woodard appeals the trial court's order granting summary judgment in favor of appellee-defendant City of New Albany (New Albany) and affirming the decision of New Albany's Board of Public Works and Safety (Safety Board) to terminate Woodard's employment as a firefighter. Woodard raises a number of arguments on appeal, many of which have been waived, and we combine and restate the non-waived arguments as follows: (1) the trial court erred by striking a portion of Woodard's designated evidence and brief in opposition to New Albany's motion for summary judgment; and (2) the trial court erroneously affirmed the Safety Board's decision, which was arbitrary and capricious and not based on substantial evidence. Finding no error, we affirm.

FACTS

Woodard was hired as a firefighter for New Albany on May 30, 1987. On October 9, 1996, Woodard submitted to a drug test in the course of his employment and his urine tested positive for marijuana. Consequently, Woodard was suspended for five days without pay. The November 9, 1996, written notice of suspension notified Woodard that "[i]f there is another occurrence regarding a positive drug test or substance abuse, you will be dismissed." Appellee's App. p. 39. On May 21, 2001, Woodard submitted to another drug test in the course of his employment and his urine again tested positive for marijuana. As a result, on May 30, 2001, New Albany formally notified Woodard that he was being discharged from his employment as a firefighter.

On August 28, 2001, the Safety Board held a hearing regarding Woodard's discharge, and on September 4, 2001, the Safety Board terminated Woodard's employment, finding as follows:

> Although Mr. Woodard chose not to testify, it was clear from documentation that he knew the consequences of his actions. . . .
>
> ***
>
> Mr. Woodard again failed a drug test on May 21, 2001 indicating cannabis in the system. According to the city's drug policy and true to the warning given 4.5 years prior, Chief Kirk acted appropriately in calling for the dismissal of Mr. Woodard.
>
> The City's drug policy is the best means available for eliminating drugs from the workplace. It is random and non-discriminating. It is the opinion of the Board that it effectively helps to deter the use of drugs and create a safe working environment—particularly in the fire department, where attention to detail and focus are paramount to saving lives.

Id. at 32.

On October 3, 2001, Woodard filed a complaint in the trial court seeking judicial review of the Safety Board's decision. On June 12, 2006, New Albany filed a motion for summary judgment and on July 11, 2006, Woodard filed a response and cross-motion for summary judgment. On August 9, 2006, New Albany filed a motion to strike portions of Woodard's brief and designated evidence. Following a hearing, the trial court entered an order granting summary judgment in New Albany's favor and granting New Albany's motion to strike on August 24, 2007, finding in pertinent part as follows:

FINDINGS OF FACT

***

8. Exhibits concerning the 1996 test results, including the written warning, were admitted at the Board's hearing.

9. Exhibits concerning the 2001 test results were admitted at the Board's hearing.

10. The drug tests were performed on a random basis and they were tested by a second laboratory to verify the results.

11. During the prior mayoral administration there were city employees who failed two or more drug tests and were not discharged . . . .

12. There were also employees during the prior mayoral administration that were fired for failing two or more drug tests.

13. The Plaintiff did not testify at the Board hearing or present any evidence that refuted the positive drug tests.

***

CONCLUSION[S] OF LAW

1. The decision of the [Safety Board] to confirm the dismissal of [Woodard] from the New Albany Fire Department was neither arbitrary nor capricious, or an abuse of discretion in view of the written warning he received in 1996 stating that he would be dismissed if he failed another drug test. Plaintiff was aware of the consequences if he failed a second drug test.

2. The decision of the [Safety Board] to confirm Plaintiff's discharge was not in disregard of the facts or circumstances and is supported by substantial evidence.

Id. at 18-22. Woodard now appeals.

DISCUSSION AND DECISION

I. Standard of Review

In reviewing Woodard's argument that the trial court improperly granted summary judgment in New Albany's favor, we note that summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001); see also Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning, 754 N.E.2d at 909. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. Id. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id.

An appellate court faces the same issues that were before the trial court and follows the same process. Id. at 908. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. Id. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. Id.

Judicial review of a decision of the Safety Board is very limited, inasmuch as the discipline of police officers and firefighters is within the province of the executive, rather than the judicial, branch of government. Sullivan v. City of Evansville, 728 N.E.2d 182, 187 (Ind. Ct. App. 2000). The termination of municipal firefighters is governed by

Indiana Code section 36-8-3-4, which provides for a hearing before the Safety Board. A decision of the Safety Board is presumed to be prima facie correct and the burden of proving otherwise is on the party appealing its decision. Chesser v. City of Hammond, 725 N.E.2d 926, 929 (Ind. Ct. App. 2000).

We will not substitute our judgment for that of the administrative body unless there are compelling reasons to do so. McDaniel v. City of Evansville, 604 N.E.2d 1223, 1225 (Ind. Ct. App. 1992). Thus, we will defer to the Safety Board's decision absent a showing that the decision was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. City of Indianapolis v. Woods, 703 N.E.2d 1087, 1090-91 (Ind. Ct. App. 1998). Absent such circumstances, a reviewing court has no authority to modify a board's decision ordering dismissal. Lilley v. City of Carmel, 527 N.E.2d 224, 226 (Ind. Ct. App. 1998).

II. Motion to Strike

Woodard first argues that the trial court erroneously granted New Albany's motion to strike portions of his brief and designated evidence on summary judgment. In opposition to New Albany's motion and in support of his cross-motion for summary judgment, Woodard's designated evidence included his own affidavit and the New Albany Fire Department Alcohol and Drug Policy. Woodard, however, did not testify in the Safety Board proceeding, and the Policy was not introduced into evidence in that proceeding.

Supplemental evidence not presented to the Board may be considered by a reviewing court only if the additional evidence could not, by due diligence, have been

discovered and raised in the administrative proceeding. Woods, 703 N.E.2d at 1092. Woodard has never claimed, and does not claim on appeal, that the information in his affidavit or the Policy was newly discovered evidence that could not have been discovered and raised before the Safety Board. Consequently, we find that the trial court properly granted New Albany's motion to strike this material.[1]

III. Summary Judgment Order

Woodard next argues that the trial court erroneously granted summary judgment in favor of New Albany and affirmed the Safety Board's decision. Evidence was presented to the Safety Board establishing that in 1996, Woodard failed a drug test. Thereafter, he was suspended for five days without pay and warned in writing that a second failure would result in his dismissal. Appellee's App. p. 39. New Albany's Assistant Controller testified that drug testing is done randomly and that each test is automatically confirmed by a second laboratory. Id. at 55-57, 105-06. She further testified that Woodard's urine had tested positive for marijuana in 1996 and 2001 and that both of those results had been confirmed by a doctor. Id. at 54-55, 57, 105-06.

Woodard claims that he was treated differently than other employees under similar circumstances. He has never, however, presented any evidence rebutting the failed drug tests, nor has he denied that he ingested marijuana. He has also presented no evidence establishing that he did not receive or understand the written warning he received following the 1996 drug test. Ultimately, we conclude that the Safety Board's findings

[1] We also note that Woodard has included documents in his appendix that were not considered by the Safety Board or the trial court. These documents and any arguments based thereon are not properly part of the record on appeal and we will not consider them in rendering our decision herein.

were supported by substantial evidence and that its decision to terminate Woodard's employment was neither arbitrary nor capricious. Thus, the trial court properly deferred to the Safety Board's decision by granting summary judgment in New Albany's favor.

Woodard raises a number of other arguments on appeal relating to, among other things, the propriety of the Safety Board's members, the propriety of the procedures employed at the Safety Board hearing, the allegedly fraudulent transcript of the Safety Board proceeding, the chain of custody of the urine samples, whether procedures set forth by a collective bargaining agreement were followed, and racial discrimination. Woodard did not raise these arguments before the Safety Board and also failed to raise many of these issues before the trial court during the summary judgment proceedings. Consequently, he has waived these arguments on appeal. See Sullivan, 728 N.E.2d at 188 (holding that issues not raised at the Safety Board hearing are waived); Fortmeyer v. Summit Bank, 565 N.E.2d 1118, 1120 (Ind. Ct. App. 1991) (holding that a party appealing the grant of a motion for summary judgment may not raise an issue on appeal that was not raised in the trial court on summary judgment).

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.